THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ADINYIRA (MRS), JSC (PRESIDING)

BAFFOE-BONNIE, JSC

MARFUL-SAU, JSC

AMEGATCHER, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/70/2018

3RD JULY, 2019

TAMAKLOE & PARTNERS UNLTD …….. PLAINTIFF/APPELLANT/APPELLANT

VRS

GIHOC DISTILLERIES CO. LIMITED ……. DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

AMEGATCHER, JSC:-

This appeal arose from a legal fee dispute between the appellant law firm and the respondent company. The appellant lost the suit it filed in the High Court and a subsequent appeal to the Court of Appeal, prompting the instant appeal to this Court. What the appellant is urging on us is to reverse the decision of the Court of Appeal dated 7th July 2016 which confirmed the judgment of the High Court presided over by Dery J, dated 25th July 2014.

The appellant is a law firm registered under the laws of Ghana while the respondent is a limited liability company engaged in the manufacture of alcoholic and non-alcoholic beverages. The facts gleaned from the record reveals that the respondent engaged the services of the appellant to handle a suit brought against it by another limited liability company, Integrated Investments Limited in the High Court, Accra and a subsequent appeal in the Court of Appeal. The relationship between the parties ended abruptly when the respondent, by a letter dated 12th July 2010, terminated the services of the appellant. The appellant thereafter served a one-month formal demand notice on the respondent in July 2011 claiming legal fees for outstanding services rendered to the respondent from 2006 till the date of termination. The respondent failed to comply with the notice served by the appellant on it, prompting the appellant to issue a writ at the High Court, Accra on 26th August 2011 claiming the following:

(a) GH¢35,000.00 being deposit of fees charged for legal services rendered to the defendant in respect of the suit known as number AC 155/2005, Integrated Investment Limited v GIHOC Distilleries Company Limited in the High Court.

(b) GH¢35,000.00 being final deposit of fees charged for legal services rendered to the defendant in respect of the suit known as number AC 155/2005, Integrated Investment Limited v GIHOC Distilleries Company Limited in the High Court.

(c) GH¢35,000.00 being fees charged for legal services rendered to the defendant for conducting two (2) appeals at the Court of Appeal in respect of suit known as number AC 155/2005, Integrated Investments Limited v GIHOC Distilleries Company Limited.

(d) GH¢5,800 (GH¢6,670.00) being fees charged for legal services rendered to the defendant for preparing all documents and providing advice needed for the Annual General Meeting of the defendant in 2006.

(e) Interest on the said sums of money at the prevailing bank lending rate from the dates on which the various bills of fees were served on the defendant up to the date of final payment.

The respondent resisted the claim of the appellant. The respondent asserts that the bills specified in the appellant's claim as outstanding are not the fees agreed with the appellant for handling its cases. It is the case of the respondent that following the submission of a bill of GH¢51,700.00 by the appellant for a winding-up proceedings which the appellant was engaged to represent it, the appellant met with its board of directors on 27th October 2005 and agreed on an amount of GH¢80,000 as legal fees for all the cases at the trial and appellate courts. The respondent further asserts that it paid an amount of GH¢30,800 in satisfaction of the AGM fees of GH¢5,800.00 and the negotiated deposit of GH¢25,000.00 which together constituted the balance of the total fees of GH¢80,000.00 agreed with the appellant on 27th October 2005. The respondent denied being indebted to the appellant and maintained that the parties did not agree on fees at the onset and that the appellant only demanded deposits which the respondent always paid until they agreed on the GH¢80,000.00.

It is the further case of the respondent that notwithstanding their agreement, the appellant purported to submit additional bills and when he was reminded of the 27th October 2005 agreement, the appellant denied ever agreeing to take an all-inclusive fee of GH¢80,000.00. The respondent said that thereafter its managing director engaged with the appellant's representative (Mr. Tamakloe) and through the intervention of a colleague lawyer and friend of Mr. Tamakloe, the managing director managed to persuade Mr. Tamakloe to once again accept the all-inclusive fee agreed upon on the 27th of October 2005.

On 25th July 2014, the trial court delivered judgment against the appellant after finding on a preponderance of probabilities that there was indeed an agreement reached between the parties on 27th October 2005 for total legal fees of GH¢80,000.00. Dissatisfied with the judgment of the trial court, the appellant filed an appeal in the Court of Appeal on 13th July 2017. On 7th July 2016, the Court of Appeal dismissed the appellant's appeal and affirmed the decision of the learned trial judge in a unanimous judgment delivered by Korbieh JA. Further aggrieved by the decision of the Court of Appeal, the appellant filed this appeal on 15th September 2016 upon the following grounds:

A. The judgment is against the weight of evidence

   PARTICULARS

   i. The appellant having denied that the meeting of October 27, 2005 ever took place, the respondent ought to have adduced sufficient evidence of the said meeting in addition to exhibit 6 tendered in support of its case.

   ii. The Court of Appeal erred in ignoring pieces of evidence on record which tended to show that the appellant could not have agreed to accept the sum of GH¢80,000 for all the cases even if they should travel to the Supreme Court.

B. The Court of Appeal erred in its interpretation and application of the provisions of Section 201 of the Companies Act, 1963 (Act 179) to the minutes of the alleged meeting of the Defendant/Respondent's Board of Directors which was attached to its Affidavit in Opposition to the Plaintiff/Appellant's Motion to Strike out

Defendant/Respondent's Defence and later tendered at trial and in the process completely glossed over the patent discrepancies in Exhibits GH1 and 6.

C. The Court of Appeal erred in its endorsement of the failure of the trial judge to consider and appreciate the other issues set down for trial, thereby failing to consider the totality of the case of the appellant to appeal.

D. The Court of Appeal erred in relying on Exhibit 6 to resolve the issue set down for trial and numbered (C) and also wrongly relied on the alleged meeting of October 27, 2005 to resolve the issue set down and numbered (d).

E. The Court of Appeal erred in coming to the conclusion that the meeting of October 27, 2005 took place.

A careful reading of the appellant's grounds of Appeal reveals that they all seek to attack the trial court and Court of Appeal's reliance on Exhibit 6 to resolve the trial and appeal in favour of the respondent. Thus, all the grounds of appeal fall substantially under Ground A, i.e., the judgment is against the weight of evidence. This is because the sum total of the appellant's contentions is that both the trial court and the Court of Appeal did not adequately consider the evidence on record in arriving at their respective decisions; meaning the judgment is against the weight of evidence. The appeal would, therefore be determined on this omnibus ground.

The authorities are legion that it is incumbent on the appellate court to analyse the entire Record of Appeal, taking into consideration the totality of the evidence on record, both oral and documentary, so as to satisfy itself that on the preponderance of the probabilities, the conclusions of the trial court and the 1st appellate court, were reasonably and amply supported by the evidence adduced at the trial. This is the principle laid down by this court in a plethora of cases including: **AKUFFO-ADDO V**

CATHELINE [1992] 1 GLR 337; TUAKWA V BOSOM [2001-2002] SCGLR 61; ACKAH V PERGAH TRANSPORT [2000] SCGLR 728; ARYEH V AYAA [2010] SCGLR 891.

Again, the circumstances under which a second appellate court like this Court may interfere with the concurrent findings of fact of two lower courts; (i.e. the trial court and the first appellate court), are well established in a long line of cases. Some of these cases are **KOGLEX LTD (No2) v FIELD [2000] SCGLR 175; NTIRI v ESSIEN [2001-2002] SCGLR; GREGORY v TANDOH IV & HANSON [2010] SCGLR 971**; **FYNN v FYNN & OSEI [2013-2014] 1 SCGLR page 729**. The Court in the Fynn case (supra) unanimously dismissed the plaintiff's appeal from the judgment of the Court of Appeal and held as follows:

"(1) the legal principles governing appeal against concurrent findings of fact and conclusions of two lower courts were that ordinarily, a second appellate court, such as the Supreme Court, would not interfere with the findings of fact made by the trial court and confirmed on appeal by a first appellate court. ***A second appellate court, i.e. the Supreme Court, would overturn such findings and conclusions only in exceptional cases. Thus the Supreme Court, as a second appellate court, would not interfere with the concurrent findings of two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts.*** *It must be established, e.g., that the lower courts had clearly erred in the face of crucial documentary evidence, or that a principle of evidence had not been properly applied; or* ***that the finding was so based on erroneous proposition of law that if that proposition were corrected, the finding would disappear****. The Supreme Court would also interfere where it was satisfied that there were strong pieces of evidence on record which were manifestly*

clear that the findings of the trial court and the first appellate courts were perverse or inconsistent with the totality of evidence and the surrounding circumstances of the entire evidence on record; or where the trial court had failed to properly evaluate the evidence or make proper use of seeing or hearing the witnesses at the trial. In the instant case, the concurrent findings were not perverse; they were amply supported by the record, and clearly consistent with the totality of the evidence. No miscarriage of justice had been occasioned by those findings and conclusions and it would be most unjust on our part, to interfere with them. Achoro v Akanfela [1996-97] SCGLR 209 applied. Obrasiwa II v Otu [1996-97] SCGLR 618; Obeng v Assemblies of God Church, Ghana [2010] SCGLR 971 at 986-987; and Mensah v Mensah [2012] 1 SCGLR 391 cited."

CAPACITY

Before examining the merits of the grounds of appeal, there is an issue of capacity raised by Counsel for the respondent on the last page of his Statement of Case, which we must address. Respondent sought to challenge the appellant's capacity to sue to recover fees as follows:

"*My Lords at the High Court, the Defendant raised the issue of the Plaintiff's failure to show compliance with Section 8(1) of Act 32 which prohibited a Lawyer from taking a Suit to cover fees unless that person has in respect of that practice a valid Solicitor's Licence. The defendant's invitation to the Court was refused on the ground that it was late in the day at addresses stage for the issue to be raised as it was not pleaded*".

It is trite that the issue of capacity can be raised at any stage of the proceedings and even for the first time in the second appellate Court. However, in **FATAL V WOLLEY [2013-2014] 2 SCGLR 1070** this Court highlighted certain conditions precedent that will enable this Court resolve an issue of capacity that is belatedly raised. In holding (1) thereof, it was held as follows:

(1) The legal question of capacity, like other legal questions, such as jurisdiction may be raised even on appeal. But it is trite learning that the principle is clearly circumscribed by law. The right to raise legal issues even at such a late stage is legally permissible ***only if*** *the facts, if any, upon which the legal question is premised, are either undisputed; or if disputed, the requisite evidence had been led in proof or disproof of those relevant facts, leading to their resolution by the trier of facts;* ***failing which the facts could, and based purely on the evidence on the record, and without any further evidence, decidedly be resolved by the appellate court****."*

From the above dictum, it is clear that while the question of legal capacity can be raised at any stage, it can only be properly raised before the Supreme Court if this Court can decidedly resolve the issue of the appellant's capacity to sue for recovery of its legal fees purely on the evidence on record. Failing that, the court is required to dismiss any allegation of lack of capacity at the last stage.

In the instant case the respondent neither pleaded facts about the appellant's lack of a valid solicitor's practicing licence nor did he cross-examine the appellant to give him the opportunity to challenge that assertion. Consequently, no evidence was elicited or adduced in proof or otherwise of the alleged lack of capacity and as a result this court cannot decidedly resolve the issue of appellant's capacity based on the evidence on the Record as it stands.

The stage at which the capacity issue was raised rendered the trial court and indeed this Court incapable of determining it. Accordingly, the issue of capacity fails.

THE OMNIBUS CROUND OF APPEAL

The judgment is against the weight of evidence

Section 14 of the **Evidence Act 1975 NRCD** 323 provides as follows:

"***Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting***"

The standard of proof required to discharge the burden of persuasion is one on the "preponderance of probabilities" and **Section 12(2) of NRCD 323** defines "preponderance of probabilities" as:

"***That degree of certainty and belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence***"

Accordingly, with regard to whether or not the respondent's board of directors held a meeting on 27th October 2005, the respondent who asserted that there was a meeting had the burden to prove that fact. The respondent sought to discharge this burden by tendering into evidence, minutes of the board meeting held on 27th October 2005. The minutes were admitted and marked as Exhibit "6" without any objection whatsoever from the appellant.

Section 5(1) and **(2)** of **NRCD 323** states that:

1) No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence unless the erroneous admission of evidence resulted in a substantial miscarriage of justice.

(2) In determining whether an erroneous admission of evidence resulted in a substantial miscarriage of justice the court shall consider—

(a) whether the trial court relied on that inadmissible evidence; and

(b) whether an objection to or a motion to exclude, to strike out the evidence could and should have been made at an earlier stage in the action; and

(c) whether the objection or motion could and should have been so stated as to make clear its ground or grounds; and

(d) whether the admitted evidence should have been excluded on one of the grounds stated in connection with the objection or motion; and

(e) whether the decision would have been otherwise but for that erroneous admission of evidence.

In the case of **Edward Nassar v McVroom [1996-97] SCGLR 468**, this court interpreting section 5 of Act 323 stated as follows:

If a party failed as required by Section 6 of NRCD 323 to object to the admission of evidence which in his view, ought not to be led, he would be precluded by Section 5(1) of the Act to complain on appeal or review about the admission of that evidence unless the admission had occasioned a substantial miscarriage of justice. Factors helping to determine whether or not a substantial miscarriage of justice had occurred have been set out in Section 5(2). Consequently, where evidence in respect of an unpleaded fact had been led without objection, the trial judge was bound to consider that evidence in the overall assessment of the merits of the case, unless that evidence was inadmissible per se. An appeal or review against the judgment might succeed only where it was established that the admission had occasioned a substantial miscarriage of justice.

Also in the case of **Akufo-Addo v Cathline [1992] 1 GLR 377** this court explained the section as follows at holding (5) that:

Where evidence was inadmissible only because the facts relied on had not been pleaded, the judge was under no duty to exclude it and its admission at the trial without objection could not be questioned on appeal. Where, however, as in the instant case, the evidence on the alleged admission of the testator would be inadmissible to prove even pleaded facts; there was a duty on the judge to exclude it even when no objection was raised. Accordingly, the Court of Appeal was justified in excluding the

evidence on the alleged admission of the testator on appeal. Furthermore, since it was hearsay evidence not coming within the exceptions mentioned in NRCD 323, it would be excluded on that ground too.

Further in **Asamoah v Servordzie [1987-1988] 1 GLR 67** the court stated that:

Evidence was led at the trial to prove the facts relied on. Therefore, if at the trial evidence being given by a party had no bearing on the facts he had pleaded it was the duty of opposing counsel to object to that evidence and exclude it. If that was not done, and the evidence got on the record, then a court could not shut its eyes to it in considering the case as a whole, particularly if it was against the party who led it.

The effect of these cases is that where evidence is admitted without objection, the court could well proceed to rely on such evidence as long as it did not result in a substantial miscarriage of justice. Further, where the court finds evidence not credible, it could also attach little or no weight to the evidence even though has been admitted without objection.

Exhibit 6 was tendered by respondent's representative one James Ossom, the recorder of the exhibit on 14th December 2012 and admitted in evidence without any objection from the appellant. His evidence was corroborated by respondent's former managing director Josiah Adusa Hagan. Both Messrs. Ossom and Hagan maintained under cross-examination that the appellant was represented by Mr. B. W. Tamakloe at the board meeting of October 27, 2005 and that he came to an agreement with the Board on the legal fees to be paid for his services on all matters that appellant was handling on respondent's behalf.

The relevant part of their evidence is reproduced from pages 155, 164 -165 and 181-182 of the Record of Appeal as follows:

*James Ossom's Examination in Chief at **page 155** of the Record*

"Q: *Now I want you to look at this document and see whether it is one of such meetings that you recorded being a meeting between the company and the lawyers that you were the recorder*

A: *These are the minutes of an emergency meeting that was held between the Board of Directors of Gihoc and Mr. P. W. Tamakloe the Company lawyer. I recorded the minutes and prepared the minutes for the Board and signature.*

Q: *What date is this?*

A: *It was held on 27th October 2005.*

Q: What do you want to do with this document in your hand?

A: I wish to comment on it as far as the meeting with Mr. B. W. Tamakloe is concerned in this court?

Q: I believe you wish to tender it in court?

A: Yes my lord.

EMERGENCY MEETING DATED 27TH OCTOBER 2005 TENDERED AND MARKED AS EXHIBIT 6"

As mentioned above, the appellant did not mount any protest to the tendering of Exhibit 6, i.e., the signed minutes of the respondent's board meeting held on 27th October 2005. Appellant rather sought to discredit Exhibit 6 by comparing it to Exhibit "GH1", an unsigned copy of the same minutes which had been earlier exhibited to an Affidavit in Opposition filed on respondent's behalf before trial. Relevant excerpts of the appellant's cross-examination of James Ossom at pages 164 to 165 of the Record are reproduced below:

"Q: *Have a look at Exhibit S that G1 that is the Emergency meeting held on 27th October 2005 not so?*

A: *Yes*

Q: *Open it again the last page you will agree with me that at the last page this minute has not been signed by the Chairman of the Board.*

A: *My Lord we have the Exhibit of a meeting held on 27th October 2005 duly signed by the Chairman and the Recorder.*

Q: *You are not answering the question I said this one that you are holding.*

A: *He obtained it before the Chairman signed it I do not know where he obtained it.*

Q: *So you are saying it was this document the chairman signed this document later after this one.*

A: *I do not know when he obtained it the minutes of a meeting goes through a certain process before they are finally signed the various members will have to go through the next meeting it is read it is corrected if everything is okay then the Chairman signs it somebody adopts it as the minutes as representing what happened at the previous meeting before the Chairman signs it and I am saying that I do not know when you obtained this.*

Q: *I am suggesting to you that by your answer by your explanation before the 22nd of November 2011 this minutes has not been signed by the Chairman.*

A: *My lord I cannot say when he obtained this document and why he is now using 22nd November 2011.*

Q: *Are you aware that this document was not obtained by me?*

A: *I do not know.*

Q: *Are you aware that this document was exhibited by Gihoc.*

A: *I am not aware.*

Q: *So I am putting it to you that by the time they filed this document the minutes had not been signed by the Chairman.*

A: *I am not aware I do not know.*

Q: *I am putting it to you that this minutes both Exhibits S and 6 are fictitious documents.*

A: *My lord I do not agree with Mr. Tamakloe."*

Apart from the unsuccessful attempt to get the witness to agree that Exhibit 6 was fictitious, the appellant did not once challenge the witness' assertion that Mr. B. W. Tamakloe was present at the meeting held on 27th October 2005.

The appellant also raised the issue of the non-compliance with section 201 of the Companies Act 1963 (Act 179). The section reads as follows:

"**201. Minutes of directors' meetings**

(1) A company shall cause minutes of the proceedings of meetings of its directors and a committee of directors to be entered in a book or books kept for the purpose.

(2) A minute kept under subsection (1) if purporting to be signed by the chairman of the meeting at which the proceedings took place or of the next succeeding meeting, is prima facie evidence of the proceedings.

(3) Where minutes have been made in accordance with this section then, until the contrary is proved, the meeting shall be deemed to be duly convened, held and conducted and the appointments of directors shall be deemed to be valid.

(4) Where a company fails to comply with subsection (1) the company and every officer of the company who is in default is liable to a fine not exceeding [five hundred penalty units]."

It is clear from section 201(3) that **until the contrary is proved**, minutes made in accordance with the provisions of section 201, are deemed to be prima facie evidence that the meetings they refer to actually took place. Further, the content of such minutes

would constitute prima facie evidence of the events that took place at the meeting(s). Thus, so long as Exhibit "6" complied with section 201, the meeting of 27th October 2005 would be deemed to be have been duly held, convened and conducted as indicated in the minutes.

The Appellant had contended that Exhibit "6" did not comply with section 201(1) because the minutes had not been entered into a book and must therefore be annulled. At pages 461 to 462 of the Record of Appeal, Korbieh JA speaking on behalf of the Court of Appeal disagreed with Appellant's assertion and said as follows:

"But which law is counsel referring to? If it is section 201 of Act 179, nothing in that provision remotely suggests that minutes should be annulled for non-compliance. True enough, section 201 is couched in mandatory terms but for breach of those mandatory terms, the section prescribes its own sanction for non-compliance. This is found in subsection (4). If the lawmaker intended any other consequence for non-compliance apart the criminal sanction, especially such a serious thing as annulment of the minutes, he would have said so in plain words. Anyhow, in support of his argument, counsel cited the English case of ***Hearts of Oak Assurance Co. Ltd v James Flowers & Sons [1936] Ch. 76*** *where it was held that loose leaves fastened together between two covers but readily detachable, was not a "book" within the meaning of section 722(1) of the English Companies Act, 1985 which required all minutes of proceedings such as meetings to be entered in books kept for that purpose. To begin with, that case is of persuasive authority only. Secondly, it did not hold that the minutes were a nullity.* ***So no binding authority has been cited by counsel to show that non-compliance with section 201 of Act 179 renders the minutes null and void. As for the argument about the decision being given per incuriam, it may be so only in the sense that the trial judge did not make reference to section 201 but this Court can make and has made good that omission."***

There is no doubt that section 201(4) of Act 179 prescribes a sanction in the form of a fine for officers of a company that fails to comply with section 201(1) of Act 179.

However, to conclude that that sanction makes minutes that have not been entered in a book as required by section 201(1) null and void, one has to look at the whole of Act 179 and its internal sanction regime to determine the lawmaker's intention. Act 179 has sections that nullify certain prohibited acts and others that provide for imprisonment, fines and penalties. Some of the provisions that clearly nullify acts are sections 56, 199 and 290 on prohibited transactions. On the other hand, provisions like sections 10, 23, 26, 29 33, 44, 72, 110, 301, 313 and 322 all provide for fines or penalties but make no express provision for nullifying the non-compliant acts or processes. Section 201(4) falls within the latter category.

It is clear from the examination of the prohibitions and penalties structured in the sections above-mentioned that the legislature intended to have some distinction and flexibility in the form of penalties it imposes such that not all breaches of Act 179 result in a nullity or a criminal offence. The legislature clearly intended that in certain circumstances sanctions for breaches should only serve as a form of administrative penalties and restraint but not to declare the acts and transactions in breach as void and unenforceable. Thus, where the legislature wanted a transaction in breach of any section of the Act to be of no legal effect, it provided clearly as in section 56 on prohibited transactions in shares.

On the other hand, where the legislature wanted a breach to be visited with a fine it also provided clearly as in sections 10, 23, 26, 33, 110 among others. Accordingly, in the absence of an express statement from the legislature nullifying minutes that do not comply with section 201(1), we see section 201(4) as one of the administrative sanctions meant by the lawmakers to act as a check on administrative defaults and nothing else. We therefore endorse the view of the Court of Appeal that minutes made in breach of section 201(1) are still valid and can constitute prima facie evidence as provided in section 201(3) of Act 179.

Both the trial court and especially the Court of Appeal thoroughly analysed the minutes contained in the respondent's Exhibit "6" and came to the conclusion that it complied with section 201 of Act 179 and therefore constituted prima facie evidence that there was indeed a meeting held on 27th October 2005 at which the parties agreed on an all-inclusive legal fee of GHC80,000.00.

We have examined the Record. It seems to us that there is sufficient evidence on record to support the findings made by the trial court and the Court of Appeal that a board meeting was held on 27th October, 2005 in which the appellant was present. In exhibit E which is a letter written on 3rd October 2008, three years after the board meeting from the respondent to the appellant, the respondent made reference to the 27th October, 2005 meeting where legal fees were discussed. The appellant replied to this letter on October 8, 2008. The appellant's letter was tendered in the trial court as exhibit F. The natural response from any person to such a claim of a meeting which never took place or was not present would be to deny at the earliest opportunity. In exhibit F, the appellant acknowledged receipt of exhibit E but did not deny the statement of fact by the respondent that he honoured its invitation on 27th October 2005 to discuss his legal fees.

In **WOOD V. TAMAKLOE [2007-2008] SCGLR 852**, this court unanimously dismissed the appeal by the defendant therein from the judgment of the Court of Appeal and stated in holding (1) as follows:

"... Per curiam. As clearly stipulated by section 20 of the Evidence Act, the effect of a rebuttable presumption is no negligible matter and it is our view that it takes more than speculation, personal opinion and conjecture to remove the assumption of the existence of the presumed fact; this must be particularly so where the presumption arises, as in this case, from documentary evidence."

In our opinion, the appellant woefully failed to adduce the quality of evidence required to rebut the evidence adduced by the respondent about the existence of the 27th October, 2005 meeting to enable this Court make a finding in its favour. The appellant was unable to adduce material evidence, be it his diary or other itinerary, to show that he could not have been present at the meeting. The appellant also failed to produce any witness to attest to his presence elsewhere on that day. The appellant rather submitted in his Statement of Case that it was the responsibility of the respondent to provide explanation for attaching the unsigned copy of the minutes to its affidavit in opposition as Exhibit GH1. Also, the appellant attempted to discredit the evidence of DW1 on the emergency board meeting leading to Exhibit 6 by submitting that DW1 did not tender any notice and agenda inviting board members for the said meeting, did not tender a letter inviting the appellant's representative to the meeting or serving him with minutes of the deliberations of the meeting and did not lead any evidence to show which board members were present at the next board meeting and adopted the minutes as a true record of what transpired at the emergency board meeting and why the minutes were not entered in the minutes book as required by section 201 of the Companies Act. The trial court and the Court of Appeal were not swayed by such submissions. We are also not persuaded by these submissions by the appellant. They are mere red herring and do not go to the root of the issue at hand.

From the record, the emergency meeting of the respondent's board took place on 27th October 2005 in which appellant was invited to brief the meeting and discuss the firm's legal fees. Whether the parties arrived at a consensus of Ghc80,000.00 is the focus of our next discussion.

Both the trial court and the Court of Appeal found as a fact that at the meeting of October 27, 2005, the appellant agreed with the respondent to charge a flat fee of Ghc80,000.00 for all the firm's cases up to the Supreme Court if the suit should end up there. As stated earlier on, a finding of fact made by a trial court and confirmed by the first appellate court will not be disturbed by the Supreme Court unless it was satisfied

that among others, that there were strong pieces of evidence on record which were manifestly clear that the findings of the trial court and the first appellate court were perverse or inconsistent with the totality of evidence and the surrounding circumstances of the entire evidence on record. It would be helpful to delve into the evidence and exhibits and see if the conclusion the two earlier courts came to is borne out by the record or there were some pieces of evidence which were ignored or overlooked which if applied could sway the decision of this Court in appellant's favour.

The only recording of agreement of legal fees in Exhibit 6 could be found at page three of that exhibit and is captured as follows:

"A member suggested that the lawyer should accept a total payment of C800 million to cover all cases.

After some discussion, the lawyer agreed to accept the total payment of C800 million for all the cases."

It is not clear from Exhibit 6 what was agreed on. Could one construe what transpired at the meeting to mean all the cases or legal matters being handled by the appellant's firm from the High Court level through the appeal stages all the way to the Supreme Court? Did the alleged agreement include non-court matters such as the annual general meeting of the company? The minutes of 27th October 2005 did not say so. Further, at the said meeting, page two of Exhibit 6 recorded that the representative of the appellant was asked the following question:

"The Chairman asked the lawyer to confirm information received that he would not charge any extra fee if the case went to the Supreme Court."

There was no recording of the appellant's answer to the question and agreeing to the request. We, therefore, find it difficult to agree with the construction and conclusion reached by the respondent that Exhibit 6 captured the agreement reached with appellant to accept Ghc80,000.00 for all the cases right and up to the appellate stage including the Supreme Court.

Subsequent events after the alleged agreement in 2005 will confirm our difficulty. During the cross-examination of DW2 on 26th April 2013 captured at pages 193-197 of the Record, he admitted that appellant submitted a bill (Exhibit B) dated 21st September 2007 for Ghc35,000.00. He further admitted the respondent negotiated this bill to Ghc25,000.00 and wrote to appellant (Exhibit C) to confirm acceptance of the negotiated amount. The cross-examination further revealed appellant wrote Exhibit D dated 15th April 2008 confirming its acceptance of the negotiated fee of Ghc25,000.00. In Exhibit E, which is the respondent's response to the appellant's letter dated August 29th, 2008, respondent on 3rd October, 2008 requested appellant to explain to it the total amount of which the negotiated figure forms a deposit as well as what other charges if any the company would be called upon to honour until the final determination of the case. In the same cross-examination, respondent admitted in Exhibit Dd dated 14th August, 2008 that it requested appellant for a negotiation of the fees submitted for the Annual General Meeting to a level acceptable to both parties.

We find it hard to reconcile on the one hand respondent's insistence that at the 27th October 2005 meeting, the parties negotiated a flat fee of Ghc80,000.00 to cover all legal fees right up to the Supreme Court and on the other hand admit in cross-examination that between 2007-2008, it was negotiating various fees submitted by appellant with it and incurring other charges the respondent may be called upon to honour until the final determination of the case. We are sure if an agreement for fees was reached in 2005, respondent would have referred appellant to that agreement and would have refused to accept the invoices submitted for fees as it did in Exhibit 9 dated 6th October 2010. Even in Exhibit 9 the admission by the respondent that it had paid the appellant an amount of Ghc51,750 plus Ghc30,675.00 making a total of Ghc82,425.00 could not be plausible as we found it again difficult to reconcile respondent's overpayment of appellant at a time they were cash strapped and had purportedly negotiated appellant's fees downwards.

The evidence therefore tilted in favour of the assertion by appellant that no such fee was negotiated. From the totality of the evidence on the record, it is our opinion that

though a proposal was made to appellant at the board meeting on 27th October 2005 to accept a fixed fee for all the cases handled for respondent, no agreement was reached by the parties on the request. A prudent company would have followed up this agreement with a letter to appellant confirming in writing the consensus reached. In any case such an agreement for a fixed fee for all the cases in the future up to the appellate courts sins against the provisions of Rule 5(2) of the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613) which provides as follows:

"5(2) A lawyer should be separately instructed and separately remunerated by fees for each piece of work done, and he shall not undertake to represent any person, authority or corporation in all their court work for a fixed annual salary. But a lawyer may accept a retainer for advice."

We believe if the learned trial judge and justices of the Court of Appeal had carefully scrutinised Exhibit 6 and had adverted their minds to the various exhibits and pieces of evidence on record, they would not have come to the conclusion that the appellant agreed at the 27th October 2005 board meeting to accept a fixed fee of Ghc80,000.00 for all the cases handled for respondent even into the future if an appeal should be filed to the Court of Appeal and then the Supreme Court. Accordingly, this Court will set aside that findings of fact made by the learned trial judge and confirmed by the Court of Appeal.

What then is the implication of setting aside the findings of the trial court and the Court of Appeal on the agreement of the Ghc80,000.00 legal fees to the claim filed by the appellant against the respondent for outstanding legal fees? Could that change the fortunes of the appellant? One critical issue which was raised by the parties in the pleadings and evidence but was ignored by the parties in their submissions before us is the legal status of the relationship between the parties. The claim before the court is not one of quantum meirut after the termination of the relationship by respondent. It is a liquidated claim for specific sums due and owing to appellant for legal services

rendered the respondent. While the legal services rendered are not in dispute, the claim for unpaid legal fees is fiercely resisted by respondent. It is a specific claim of which appellant as plaintiff bore the legal burden of proof. Was the burden discharged at the close of the evidence? To deal with this matter conclusively for the guidance of the legal profession, we shall pose the following questions and proffer answers to them. Did the parties at the onset negotiate the legal fees payable? Did they sign any retainer, fee paying agreement or engagement letter? Was there any correspondence from one party stating the fact of the agreement which was not disputed by the other party?

The dispute erupted because the parties failed to enter into any fee-paying arrangements as required in any valid contract. The appellant jumped at the excitement of a new client, failed to negotiate its fees and opted for an ad hoc way of billing piecemeal in the course of the instructions and at the end of the case. These unexpected and un-negotiated bills were fiercely resisted by respondent, resulting in complaints of high fees and negotiations. These resistances were described by appellant as haggling over fees. Not surprising, it was the cause of the deterioration in lawyer-client relationship leading eventually to the professional divorce. In paragraph 17 of its defence respondent pleaded as follows:

"The Defendant says that the Plaintiff did not agree with the Defendant at the onset the fees it would charge for handling its cases and was fond of demanding what he called deposits which the Defendant always paid until the agreement was reached with the Plaintiff over fees for handling the cases."

Josiah Hagan, DW2 also adduced evidence to show that prior to the meeting of 27th October 2005, there had been no agreement on fees with the appellant. At **pages 181 to 182** of the Record, Josiah Hagan testified as follows:

"Q: *Now in respect of this winding up can you proceed and talk about the fees arrangement that you did with Tamakloe & Partners?*

A: My lord we did not come to any specific fee because anytime we raise the issue he said of fee is not important, the important thing is to win this case I will not charge you much you know we are doing it virtually for free so just give us some deposits cost and so on for filing and from time to time I will submit such request so that was how Mr Tamakloe approached it and we asked several times to come to an agreement on a fee even at one time we had to collect the schedule of fees from the Bar Association……"

The fact that there was no fee agreement between appellant firm and respondent was confirmed by appellant himself during his cross-examination on 25th April 2012 at pages 125-127 of the Record. Below is the dialogue between counsel for respondent and the witness for appellant:

"Q……Now when you were engaged did you discuss from the beginning your fees that you charged Gihoc in respect of the conduct or a case that you are asking you to handle that is the integrated against Gihoc.

A. As have already told the court we were already working for Gihoc Distilleries limited. At the time we were engaged by Gihoc Distilleries limited Gihoc was in bad shape……..

Q. So I am suggesting to you that in integrated investments and Gihoc Distilleries when you were engaged in 2005 you did not have any agreement the amount that you should be paid for the services you are rendering in respect of the case.

A. From the beginning, we did not agree to the amount that we should be paid on that basis but in the end we agreed on the amount that we should be paid for those services…….

Q. Are you a member of the Ghana Bar Association?

A. I am a member of the Ghana Bar Association.

Q. I believe you are aware of the regulations regarding dealing with the clients on fees when someone engages you on to do a matter on.

A. I am aware of it.

Q. And by a scale of fees of lawyers when you are engaged by your client for a particular case in respect of that case you are supposed to at a time discussed engaged and negotiate with the client that he will be called upon at the time of……

A. It is not in all cases because this are of a nature of cases are of a nature that you cannot determine your fees at the beginning when you are engaged in that case you can make your client be aware of that and he agrees you can handle his things for him.

Q You are aware that there is that requirement.

A. Yes.

While conceding that there was no agreement reached between the parties on legal fees in the beginning, appellant contended that in the end the parties agreed on the amount to be paid for appellant's services. However, a careful review of the totality of the evidence on record including evidence elicited from appellant on pages 127 to 128 shows that correspondence forwarded by appellant to respondent on fees were one-sided and not subsequently agreed upon by respondent. On the contrary, respondent rather wrote to appellant on more than one occasion seeking to understand the basis of their charges and reminding appellant of the latter's earlier agreement to accept an all-inclusive fee. At ***pages 129 to*** **130** the following evidence was elicited from appellant during cross-examination***:***

"Q: *So in respect of this particular case that you handle that they were 351,000 dollars from the defendant Gihoc which you were defending that matter what as*

a member of the Ghana Bar Association being aware of the scale if you were plaintiff's lawyer what you will get as a 15% or 10% what in the circumstances will be your rightful charge.

A: My rightful charge is I have charged

Q: *And what is the percentage of that charge*

A: I have not computed the percentage

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Q: *So I am suggesting to you that you did not when you took instructions from the defendant at the beginning of the case discuss with them the fees that you will charge.*

A: *As I explained on in the case we took this matter at the time when Gihoc was at the point of bankruptcy they were not having any money they could not pay their bills and we discussed with them and I tendered into evidence my letter by which we said that as it carried on with this case we shall be submitting bills on deposits from time to time and that was why we did not throughout this case and they accepted those bills and paid them from time to time.*

Q: I am suggesting to you personally as a member of the Ghana Bar Association you are obliged by the Ethics of the Profession to charge a client at the beginning of a case.

A: My lord we explained to our client at the beginning of this matter that since they were in that precarious position we would not like to overcharge them and that we will rather be taking deposits from time to time as the cases went on*."*

Clearly, appellant and respondent did not have a definitive agreement on the fees payable for the appellant's services and from the appellant's own showing, appellant was not even sure how to compute the fee payable. In addition to being in breach of

the ethical duty to negotiate fees at the start of the engagement, the above evidence shows that appellant **did not** negotiate the sums endorsed on its writ with the respondent before presenting the respective invoices. The sums being claimed were belatedly disclosed at the point of submitting invoices to respondent contrary to the express provisions of the Scale of Fees that fees must be negotiated at the commencement of an engagement.

This court has taken judicial notice of the fact that it is the General Council of the Ghana Bar Association which is charged with the responsibility of issuing out to practising lawyers the Scale of Fees or established tariffs. The relevant provision of the current scale of fees of the Ghana Bar Association provides as follows:

"Remuneration for legal services must measure up to the value of the time spent or value created as determined by the economic environment in which the service is provided.

The Scale of Fees covers charges for professional services rendered by lawyers. Fees are quoted in both Ghana Cedis and US Dollars and are to be applied to services rendered to Ghanaian clients and international clients respectively as prescribed by law.

The essence of these guidelines shall be negotiation and agreement between Counsel and the client within the range prescribed below before the commencement of the provision of legal services. The law entitles every lawyer to reasonable compensation for his services. In negotiating for fees a lawyer shall adhere to these approved tariffs and shall avoid charges which either overestimate or undervalue the service rendered, though in legal aid cases, the poverty of the client may require a less charge or even none at all.

The negotiation will take into consideration the nature and/amount of work involved and estimated time to be spent on it.

The terms of payment may include a deposit of up to fifty percent of the agreed fees payable upon firm instructions being given to commence work unless the Client and Counsel agree otherwise."

The Scale of Fees of the Ghana Bar Association derives its legal authority from section 28 of the Legal Profession Act 1960 (Act 32) and rule 9(9) of the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613)

"Section 28—Costs Recoverable.

A lawyer shall not be entitled to recover any costs in respect of any proceedings beyond the amount applicable to the proceedings which may be allowed by the authorised scale of fees or, in matters not therein included, which the Court may allow on taxation, having regard to the skill, labour, and responsibility involved.

Rule 9 (9) A lawyer is entitled to reasonable compensation for his services, but he shall avoid charges which either overestimate or undervalue the service rendered. When possible he shall adhere to established tariffs. The client's ability to pay cannot justify a charge in excess of the value of the service, though his poverty may require a less charge or even none at all."

As lawyers in Ghana, the lawyers in appellant's firm are subject to Act 32 as well as the Rules emanating from it and the authorized Scale of Fees. It is also noteworthy that during cross-examination of appellant's representative he was directly questioned in his capacity as a member of the Ghana Bar Association (GBA) and he did not deny that fact. The provisions of the Scale of Fees therefore bind appellant.

The importance of providing the client with a written letter of engagement at the outset of a matter was emphasised by Yvonne Gonzalez J in the Bronx County Supreme Court case of **Klein Calderoni & Santucci LLP v Bazerjian 800 N.Y.S. 2d 348, 2005**

WL 51721 (Sup. Ct. Bronx County 2005). In that case, the Disciplinary Rules of the New York Code of Professional Responsibility provides that an attorney who undertakes to represent a client and enters into an arrangement for, charges or collects any fee from a client shall provide to the client a written letter of engagement before commencing the representation, or within a reasonable time thereafter if otherwise impracticable.

Plaintiff represented defendant at an appellate hearing before the September 11th Victim Compensation Fund. As a result of the hearing, the compensation awarded to defendant was increased from the standard, $65,000, to $204,451. Plaintiff billed defendant $34,862.75 which is 25% of the award recovered over $65,000. Defendant disputes that he agreed to any contingency fee, whatsoever. Plaintiff, however contends that the 25% of the award recovered over $65,000, was the agreed contingency fee. The Klein law firm further argued that the short span of five days between the client's visit to the office and the hearing had made it impracticable for the firm to prepare a letter of engagement. Judge Gonzales held that there was sufficient time and opportunity to negotiate and provide the letter and that the firm's failure to provide it was deliberate and intentional. The judge found that the failure to sign a retainer with the client is a prerequisite for an attorney to receive legal fees. Hence the failure to supply a letter of engagement or a retainer agreement, the Klein law firm would be denied a fee amounting to $34,862.75.

In **Feeder, Goldstein, Tanenbaun & D'Errico v Ronan, 195 Misc.2d 704, NYS2d 463 (Nassau Gy Dist Ct 2003)** the law firm entered into an oral fee agreement with the client to appear in court on the client's behalf. In a dispute over the fees charged for the representation, the court held that since the law firm failed to enter into a written letter of engagement or retainer with the client as required by the Disciplinary Rules of the New York Code of Professional Responsibility, the legal firm was precluded from recovering legal fees. The court's conclusion was based on the fact that it was the law firm which failed to provide the client with a written letter of engagement or written retainer agreement for execution by the parties.

The two cases cited above are of a persuasive authority to this court. However, the policy rationale behind the cases is significant for lawyer-client professional relationship and the practice of law in our jurisdiction especially when the equivalent of the provision in the New York Code of Professional Responsibility is the Legal Profession Act and the Legal Profession (Professional Conduct and Etiquette) Rules which gave legal backing to the Scale of Fees of the Ghana Bar Association. We, therefore adopt the reasoning in the cases.

Law firms and lawyers practising in Ghana are required in the services they render to their clients to strictly adhere to approved scale of fees or established tariffs. The scale of fees requires lawyers to negotiate and agree with the client the fees to be charged based on the range provided for each service and the terms of payment before the commencement of the provision of legal services. In breach of the Scale of Fees, appellant chose to render the service before sending invoices for his services for the payment by the client. From the evidence and exhibits, the only service that parties agreed on the legal fees was the bill dated 21st September 2007 which was renegotiated from Ghc35,000.00 to Ghc25,000.00 (see exhibits C, D and F). Even this bill was not negotiated at the onset of the case. In all other invoices and bills, appellant commenced the service before submitting his fees. Not surprisingly, this was fiercely resisted by respondent as series of correspondence between the parties tendered in the suit revealed. It was this back and forth regarding the fees payable that the appellant called "haggling over fees" which eventually led to the filing of this suit. Even the alleged agreement for the sum of Ghc80,000.00 at a board meeting which has been in dispute is the direct result of failure to agree on fees and respondent taken by surprise at the invoices later submitted by appellant.

What then is the effect of the failure on the part of appellant to negotiate and agree on the fees with the client before commencement of the service? Public policy dictates that the courts show interest in the fee arrangement between law firms or lawyers and their clients. The policy rationale is that agreement for fees entered into with clients ought to

be fair, reasonable and within the confines of the fee range prescribed in the Scale of Fees of the Ghana Bar Association. This is necessary so that members of the public who are served by lawyers are not short-changed by a few sharp practitioners. Thus, an agreement to provide legal services like any other agreement must meet the requirements of a simple contract such as offer, acceptance, intention to create legal relations and consideration. A law firm or lawyer who fails to negotiate and agree on the legal fees with the client before commencement of the service or within a reasonable time after the commencement (if the instruction is an emergency one in which legal fees could not have been agreed before the commencement) of the service is not entitled to recover any fees if the client disputes the fees invoiced it subsequently. This directive is needed today more than ever to sanitise the profession and ensure transparent and fair dealings with clients. It is also needed to avert situations where the clients find themselves at a disadvantage because of the power imbalances in the relationship between lawyers and their clients and the privileged position lawyers occupy in society. When instructed by the client, a lawyer or law firm is required to discuss, negotiate and agree with the client the fees payable within the range provided in the Scale of Fees and then execute a written retainer agreement, engagement letter or fee paying agreement detailing the scope of legal services to be performed, the fees and expenses to be charged and the possibility of a refresher fees if the assignment goes beyond the anticipated time frame for such cases. The agreement with the client shall also provide the terms of payment of the fees, the percentage payable as deposit, the type of fee structure i.e. fixed fee, fixed fee plus success fee, hourly fees, hourly fees plus success fee and fixed fee for part of the work and hourly fees for the other part. If the service is to be rendered pro bono, the agreement must specifically state so.

Concluding, appellant law firm in this case failed to negotiate, discuss and agree on its legal fees with respondent before the commencement of the service. In addition, appellant also failed to enter into a written retainer, fee paying or engagement agreement with respondent detailing the scope of work and the legal fees payable by

the client for the service. Such conduct was in breach of the Scale of Fees of the Ghana Bar Association and accordingly in breach of section 28 of the Legal Profession Act 1960 (Act 32) and rule 9(9) of the Legal Profession (Professional Conduct and Etiquette) Rules, 1969 (LI 613).

The invoices for fees which appellant later submitted to respondent were arbitrary and not negotiated with respondent. The foundation, therefore, for the reliefs endorsed on appellant's writ as outstanding fees for legal services rendered was not there at the inception of the suit and therefore not recoverable. As a result, the appellant's action fails.

The trial court and the Court of Appeal were justified in dismissing the claim of appellant. We for different reasons as illustrated above affirm the decision of the courts below that the appellant's action must fail.

For these reasons the appeal is dismissed.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

P. BAFFOE- BONNIE
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Amegatcher, JSC.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

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